No. 15130

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Bank of North Idaho, Inc., substituted for the BANK OF NORTH IDAHO, INC., a corporation,

Appellant,

vs.

MERLE C. MYHRE AND BETTY A. MYHRE, husband and wife,

Appellees.

Upon Appeal from the District Court of the United States for the District of Idaho, Northern Division

BRIEF OF APPELLEES

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STATUTES

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court of the United States for the District of Idaho, Northern Division, was invoked pursuant to the provisions of Title 28, United States Code, Section 1332. The appellees were citizens of the State of Washington, and the appellant was a citizen of the State of Idaho, viz., a banking corporation organized and existing under the laws of the State of Idaho. (R. 7) The amount in controversy exceeded the sum of $3,000.00, exclusive of interest and costs. The pleadings showing jurisdiction in the Federal Court consist of Complaint (R. 13-22) and Answer (R. 33).

The jurisdiction of this Court to review this case arises under Title 28, United States Code, Sections 1291 and 1294, this being an appeal from a final decision of a District Court of the United States from which an appeal may be taken to this Court. (R 4).

STATEMENT OF CASE

Appellees, residents of the State of Washington, commenced this action against the Bank of North Idaho, an Idaho corporation, seeking an accounting and recovery for wrongful conversion of personal property listed at (R. 22 to 31).

Appellees on November 10, 1953, borrowed $1,500.00 from the said Bank and executed a Promissory Note therefore and also a form of Chattel Mortgage which, at the time of execution did not contain a description of the property to be mortgaged. (R. 15) Later the Bank caused to be inserted in such Chattel Mortgage form a description of property of appellees not intended or agreed upon as security for this debt.

Shortly after default had occurred in re payment under said Note appellees turned over to the Bank a large amount of property, most of which was not covered by said Mortgage, under an agreement whereby the Bank would promptly release to the appellees all articles of a personal nature and further that the Bank would sell, for the best price obtainable, so much of the remainder as was necessary to satisfy appellees' obligation to the Bank and that any surplus from sale and the remainder of the property would be by the Bank returned to appellees.

The Bank took possession of the property on March 17, 1954. Notwithstanding a demand for an accounting and return of the property as per the agreement the

Bank refused to do either and this action was commenced in August of 1954 to compel the Bank to account and to recover the value of the property wrongfully converted by the Bank. (R. 21-22) This action was commenced long before any insolvency of the Bank was heard of.

The appellant was later, upon its own application, substituted as party defendant in the action. The case was tried before Chief District Judge Chase A. Clark who found that the Bank converted appellees' property on May 1, 1954, which was at that time of the fair value of $8,000.00 which is $5,923.46 in excess of the amount that appellees were obligated to the Bank for. (R. 11) The Trial Court further found that the defendant Bank, upon taking possession of the appellees' property, under the circumstances, became a trustee of such property and by reason of said status and the conversion of such property by the defendant Bank the judgment should carry with it a priority as a trust fund. Judgment was entered accordingly from which this appeal is taken.

ARGUMENT

I.

In appellant's brief two propositions are argued, the first is stated to be: (p. 8, appellant's brief)

> "No funds or property of the appellees were traced into the hands of the receiver and *therefore* the judgment entered in this cause is not entitled to priority in payment as a trust fund."

There is nothing before this Court in the way of a transcript or record of the evidence from which this Court could learn what was shown or proved by the evidence. From the record on appeal how can it be determined by this Court or anyone as to what the evidence proved or failed to prove? Notwithstanding the fact that we sincerely contend that such an argument by appellant is beyond the scope of the record on this appeal we *certainly deny* that the evidence submitted on the part of the appellees *failed* to establish the existence of a trust and that the trustees assets were augmented or benefited by the trust fund. Appellees allege in their complaint all the facts which establish the trust — the appellees turned their property over to the defendant Bank under a special and definite agreement concerning its handling and disposition. The general definition of a trust is stated in 65 C. J. 212, as follow:

> "a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived."

In the case of *Mechanics and Metals National Bank* vs. *Pingree,* 40 Idaho 118 (at page 128) ; 232 Pac. 5, the Supreme Court of Idaho quoted with approval as follow:

> "Where property, real or personal, is conveyed by a debtor to his creditor with a power to sell and dispose of it, and apply the property to the payment of the debt, the creditor in executing such power *becomes the trustee* of the debtor, and is bound to act bona fide, and to adopt all reasonable modes of proceeding in order to render the sale most beneficial to the debtor, like any other agent, factor or trustee to sell."

In the case of *Ivie* vs. *W. G. Jenkins and Company, Bankers,* 53 Idaho 643; 26 Pac. 2d 794, the Supreme Court of Idaho had under consideration an action for the recovery of a trust fund, — the money was turned over to the Bank for the purpose of purchasing an Australian Bond, and the Court quoted with approval the following:

> "In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it should fail to apply it at all, or should misapply it, *it can be recovered as a trust deposit."*

The Court also discussed the evidence as follows:

> "The undisputed evidence shows the money was delivered by appellant to the cashier of the bank, in its place of business, during banking hours, and that, acting for the bank, he received and receipted for it in his official capacity for the specific purpose of buying an Australian bond for appellant. There is no evidence that the money, or any part of it,

> ever passed out of the bank. Neither party offered to prove what became of the money after it went into the bank and, so far as the record discloses, there is nothing in the bank's books showing what became of it. Undoubtedly appellant has established, as a fact, that her money was received by the bank and it is immaterial what bookkeeping entry was made with respect to it, or whether any was made. If an entry was made showing the money had been deposited or used in violation of appellant's instructions, it would not change the nature of the transaction."

The Court in that case directed that the fund be regarded as a trust fund and given that priority.

In the case of *Cox* vs. *St. Anthony Bank and Trust Company,* 41 Idaho 776; 242 Pac. 785, the Court said:

> "On the establishment of a trust, the ordinary relation of a debtor and creditor does not exist."

and quoted:

> "A true owner of a fund traced to the possession of another has a right to have it restored, not as a debt due and owing but because it his property wrongfully withheld from him."

In the instant case there is no issue on this appeal as to whether or not the evidence was sufficient to establish a trust — the uncontradicted record does show that Judge Clark, the trier of the facts, found that the defendant Bank, upon taking possession of the property involved, took it as trustee for appellants. (R. 12 and 37) In this connection we call attention to the kind and amount of property which was taken by the defendant. (R. 22-31) furniture, (which alone was worth more

than what the appellees owed the Bank) sporting goods, hardware, tools and miscellaneous articles, bedroom and bathroom accessories, kitchen utensils, dishes, living room, den and dining room furnishings and decorations, personal clothing and even personal and private papers including appellee's military service records and his discharge papers, family photos and keepsakes — none of which has ever been paid for or returned.

II.

Referring now to the second point referred to in appellant's brief which contention is that the United States District Court was without jurisdiction to assign the judgment a priority as a trust fund.

It will be remembered that the appellant, under this appeal, concedes that this action may be maintained in the Federal Court, and it is not contended that the amount of the judgment is excessive — it merely contends that the United States District Court should not have granted the priority.

This action was commenced before there was any thought of insolvency as concerns the defendant Bank. The appellant, a federal agency, upon its own application was substituted as the party defendant and voluntarily submitted to the jurisdiction of the Federal Court — no one compelled the appellant to become a party to this action — in fact it voluntarily assumed the duties as liquidator of the defendant bank. It need not have become a party to this action, in fact the Supreme

Court of Idaho, in the case of *Bybee* vs. *D. W. Standrod and Co.,* 44 Idaho, 708; 260 Pac. 157, has held in substance that the appellant, acting in the capacity it does in this case, cannot in a case of this kind be sued without its consent. However appellant voluntarily submitted, as liquidator of the defendant Bank, to the jurisdiction of the Federal Court for all purposes as concerns this action. It knew that such Court would decide all controversies that existed or may arise between the parties in the case. Under the Federal Rules of Civil Procedure it is the duty of the Court to adjudicate all controversies which exist or may arise in a case. In the case of *Dairy Engineering Corporation* vs. *DeRaef Corporation,* 2 Federal Rules Decisions 378, the Court said:

> "Under the Federal Rules of Civil Procedure, it is the court's duty to bring in for adjudication all controversies which exist or may arise in the case, so that all questions may be settled, regardless of technical averments."

Why should not the Trial Court determine all questions that may arise between the parties? The appellant was before the Court as liquidator of the defendant Bank — by defending in the action it was denying that appellees were entitled to any relief whatever. Appellants position was, at the time of the trial, the same as if claim had been made by appellees and denied by appellant and they were before the Court for the purpose of having it determined what relief, if any, the appellees were entitled to.

There is no merit to a contention that the Trial Court should not have granted the priority because it was not specifically prayed for. At the time this action was commenced there was no necessity of priority but when the appellant entered as a party it knew that if the appellees prevailed in their action that the determination of the order of priority would be consistent with the Court's duty to fully adjudicate the controversy between the parties. Under the Federal Rules of Civil Procedure the Court can grant such relief as it finds the parties entitled — irrespective of specific prayer in pleadings.

> "We need not consider whether appellant has asked for the proper relief. By Rule 54 (c) of the Federal Rules of Civil Procedure' * * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Keiser vs. *Walsh,* 118 Fed. 2d 13.

Nor is there any merit to a contention that appellees are not entitled to the relief granted because the complaint did not specifically allege that a "trust" existed. The complaint in this case fully set forth the facts from which it was expected that the Court would, and did, declare conclusions of law. In the cases of *Gold-Washing and Water Co.* vs. *Keyes,* 96 U. S. 199; 24 Law. Ed. 656, also in the case of *Federal Savings and Loan Ins. Corp. vs. Third Nat. Bank,* 60 Fed. Supp. 110, it is stated:

> "The office of pleading is to state the facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises."

The appellant knew when it entered this case that the Court would determine all controversies that may arise between the parties relating to the subject of the action and accordingly knew that if appellees prevailed, the Court would, in order to prevent a multiplicity of actions and in keeping with the statutes and rules governing the Federal Courts, decide what classification the recovery would be placed in. Consequently it was the duty of appellant to set up whatever defense or objection it had, if any, either by motion or answer, and its failure to do so constituted a waiver. Sub-paragraph H of Rule 12 of the Rules of Civil Procedure provides:

> "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. *"

Appellants answer is nothing more than a general denial. (R. 33) If appellant wished or intended to be heard on any question of order of payment, in the event of appellant's recovery, then it was its duty to make such known in the manner as provided by said rule.

As concerns the matter of jurisdiction the appellant concedes (p. 14 of appellant's brief) "that the present action may be maintained in the Federal Court is not here called into question" and it had jurisdiction long before any State Court or officer had anything to do

with any phase of the subject or parties involved. The appellant itself is a Federal Agency. The powers and jurisdiction of the Federal Courts in case of this kind are discussed in the case of *Commonwealth of Pennsylvania* vs. *Williams,* 72 Fed. 2d 509, as follow:

> "While sitting in a state as a court of the United States, the federal court accepts and gives effect to the laws of the state, so far as they do not affect its jurisdiction and the rights of nonresident creditors. Yet it exercises powers independent of the state. A state cannot take away the plenary power of the federal courts given to them by Congress by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescribing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means."
>
> "Whenever citizens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts; and no state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct the litigation, to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject-matter during its pendency

> in accordance with their established rules of practice, *and finally to adjudicate the claims of the parties and to enforce their judgments.*"

The Court further said:

> "When federal courts first exercise their jurisdiction, they can maintain it to the end of the litigation, to the exclusion of a state court having concurrent jurisdiction. "

In the case of *Sacramento Municipal Utility District* vs. *Pacific Gas and Electric Co.,* 128 Pac. 2d 529, the Supreme Court of California said:

> "It is not questioned that as a general rule the jurisdiction of federal courts over cases within the field of their jurisdiction cannot be enlarged, diminished or impaired by state statutes or regulations; and a person may not be deprived of his right to resort to the federal courts by state legislation."

Certainly no one will argue that the Trial Court in this case did not have the right or jurisdiction to make a finding and to conclude as a matter of law that the defendant Bank held the appellees' property as a trustee and that the money payable to appellees is a "trust fund". This Court is the only authority entitled to review the Trial Court's decision in that respect and since there is no transcript of the evidence before this Court it will undoubtedly be conclusively presumed by this Court that the evidence justified the conclusion reached by the Trial Court. Does the appellant or any State Court now have the right to nullify the Trial Court's conclusion on that point and say that there was no trust involved? Does it take another lawsuit involving the

same identical parties and evidence to determine whether or not a trust was involved and that the judgment in this case is entitled a priority as such?

CONCLUSION

We respectfully submit that a Court of competent jurisdiction has determined that the amount payable to appellees is a fund held in trust — and the Idaho Statute (Section 26-915, Idaho Code) (shown at page 23 of appellant's brief) prescribes the order of payment of such fund. We contend that the appellant is bound by the findings and conclusions of the Trial Court as to the Classification into which this judgment should be placed and it is bound by the Idaho Statute as concerns its order of payment under such classification and consequently the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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